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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 83

FRANK COSTELLO, *Petitioner*

*v.*

IMMIGRATION AND NATURALIZATION SERVICE,
*Respondent*

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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No. 882

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The government argues, in opposition to certiorari, that, whatever be the construction of "alien . . . who . . . is convicted", as used in § 241(a)(4) of the Immigration and Nationality Act of 1952, petitioner is deportable because he "was an alien when convicted". Brief, pp. 4, 6n. The question of the alleged voidness *ab initio* of petitioner's naturalization was not referred to in the petition for certiorari because the court below, although the question was fully argued to it, saw fit to ignore it as a basis for approving the deportation

order. The holding below was that § 241(a)(4) applies to petitioner because he is now an alien, not that he was an alien at the time of the tax convictions.

In these circumstances, it is necessary for petitioner to reply to the government's assertion that his post-conviction denaturalization related back, for the purpose of deportation, to make him an alien at the time of the convictions.

The basis of the government's assertion is an importation into the deportation statute of the provision of § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. §.1451(a), under which petitioner was denaturalized in 1959, that the order of denaturalization "shall be effective as of the original date of" the naturalization order.

A somewhat similar argument had been urged by the government in *Mangaoang* v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876. The Philippine Independence Act of 1934 contained a provision that "for the purposes of . . . laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States *shall be considered as if they were aliens.*" (Emphasis supplied.) The government argued, therefore, that, for the purpose of the deportation provision of the Internal Security Act, Mangaoang should be considered as if he were an alien during the time that he was a member of the Communist Party. The court, in disposing of the government's contention, noted that the 1934 Act did not make Mangaoang an alien in 1938, but provided only that he was so to be considered for limited purposes. If he were to be deported, the court noted, it

would have to be by virtue of the Internal Security Act of 1950. The court said:

> "The question is whether the word 'aliens' in subdivision (C)—'Aliens who are members of . . . the Communist Party', includes not only aliens in the ordinary sense but was intended to be broad enough to include persons who were in reality nationals of the United States but who under the provisions of the Act of March 24, 1934 were to be 'considered as if they were aliens'.
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> "If it be conceded that the word 'aliens' in the present Act [Internal Security Act of 1950] might possibly be given so broad a construction, *the most that could be said is that this possibility suggests an ambiguity.* There is nothing to show that when Congress enacted the Internal Security Act, it had in mind the very special case of the Filipinos described in the quoted section of the Act of March 24, 1934. Clearly we deal here with an Act which, if it were to apply to this appellant, would have a punitive impact. * * *
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> "We think that the rule of strict construction should be applied to a statute having this impact, and that subdivision (C) above quoted must be construed to use the word 'aliens' in the ordinary sense and connotation, and not to include Filipinos who were for certain limited purposes to be 'considered as . . . aliens', under a section of a law long since obsolete and inoperative. We think therefore that the Act here in question did not authorize the appellant's deportation." 205 F. 2d at 556. (Emphasis supplied.)

The court held, in short, that though persons like Mangaoang, under the 1934 Act, were to be "considered as if they were aliens" for various purposes, they could not be so considered for deportation purposes.

The very same argument respondent makes here was also made in *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663 (6th Cir. 1956). In an opinion by Judge Miller, concurred in by Judge (now Mr. Justice) Stewart, the court said:

> "The Government's contention would require that we give the statute a relation-back construction. We have no difficulty in giving a retroactive effect *to the denaturalization order* in view of the authorities supporting such a ruling. But the Government has cited us no case from the Supreme Court or the U. S. Courts of Appeals which has gone the additional step and given such relation-back construction to the *deportation statute*. It was urged upon the Supreme Court in United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521, 529, 70 S. Ct. 329, 94 L. Ed. 307, where the Court found that a ruling on the question was unnecessary for a disposition of the case. We think that the Court's later ruling in Barber v. Gonzalez, supra, 347 U.S. 637, 642, 74 S. Ct. 822, 98 L. Ed. 1009, indicates disapproval of a relation-back construction." 239 F. 2d at 666. (Emphasis supplied.)

That *Brancato* involved the first clause of § 241(a)(4) ["... a crime ... committed within five years after entry ..."], while the instant case involves the second clause ["... at any time after entry is convicted of two crimes ..."], does not, as the government contends (Brief, p. 4, n.1), impair *Brancato's* force here. What *Brancato* said of the inapplicability of the relation-back doctrine for deportation purposes was not directed to any particular ground of deportation but to "the deportation statute" generally.

If the relation-back doctrine were imported into the deportation statute, "the most that could be said,"

just as in *Mangaoang*, "is that this possibility suggests an ambiguity." And, again as in *Mangaoang*, "there is nothing to show that when Congress enacted [§ 241 (a)(4)], it had in mind the very special case of" an individual convicted of crimes long after naturalization and before denaturalization. The ambiguity resulting from importing into the deportation statute the relation-back concept of the denaturalization statute would have to be resolved here, just as it was in *Mangaoang*, in favor of the alien and against deportability.

The function of § 241(a)(4), as this Court said of the equivalent deportation provision of § 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 874, 889, as amended, "is to apprise aliens of the consequences which follow after conviction . . . of the requisite two crimes." *Jordan* v. *DeGeorge*, 341 U.S. 223, 230. And, though not a criminal statute, a deportation statute should be tested in the light of the "void for vagueness" doctrine. *Id.* at 230-231. As was said in *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 656-657 (9th Cir. 1962), *cert. granted*, 371 U.S. (Preliminary Print) 859, in striking down on due process grounds a deportation order based on a conclusion that homosexual conduct is included within "psychopathic personality" as used in § 212(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(4):

> "In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. [Citations omitted.] Or, as [otherwise] stated . . . , would persons of 'ordinary intelligence' be able to know what the statute means."

Surely petitioner cannot be said to have been on notice, when he filed the tax returns upon which he was convicted, that his 1925 naturalization was a nullity. Indeed, two of the eight Justices of this Court who ruled on his denaturalization were of the opinion that he held valid citizenship. *Costello* v. *United States*, 365 U.S. 265, 288. Section 241(a)(4) certainly does not apprise an individual who, for a quarter of a century, has been enjoying the rights and privileges of citizenship that, if he should be convicted of two crimes of a certain type, he would be subject to deportation. To inject that consequence into the deportation statute by reading into it the relation-back concept of the denaturalization statute needlessly imperils the former statute by introducing an element of vagueness which Congress did not place therein.

Moreover, to read into the deportation statute the relation-back concept of the denaturalization statute would eliminate the effect of § 241(b), which has been held to be an essential part of the legislative scheme. *Gubbels* v. *Hoy*, 261 F. 2d 952, 954 (9th Cir. 1958); see Petition herein, pp. 11-12. All persons treated as aliens for deportation purposes by application of the relation-back theory would automatically have been deprived of their opportunity to seek a recommendation of non-deportation. The intent of Congress that not all crimes involving moral turpitude should result in deportation, *Tutrone* v. *Shaughnessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958), would thus be thwarted.

The relation-back rule which respondent urges upon this Court goes beyond the position respondent itself has taken administratively in other cases. The Board of Immigration Appeals, while utilizing the relation-back concept from time to time, appears never to have

sought to apply it to make a deportation sanction retroactive under a statute written *in praesenti*. Thus the Board applied it in *Matter of P—*, 4 I. & N. Dec. 373 (1951), in sustaining a deportation under the counterpart of the present § 212(a)(9), which covers "aliens who *have been convicted* . . ." prior to entry. A similar application of the concept was made in *Matter of W—*, 5 I. & N. Dec. 764 (1954).

To use the relation-back concept to make § 241(a)(4) retroactive would seem inconsistent with the Board's own basic distaste for the concept. In *Matter of C—*, 3 I. & N. Dec. 275 (1948, approved by Attorney General 1950), the Board said, in reversing the deportation of an alien based on an entry without a visa while he was a naturalized citizen:

> "When respondent left the United States in August 1930 to visit in Europe and when he returned in June 1931, he was, both from a legal and from a factual point of view, an American citizen. As such he was not in any way subject to the immigration laws. He was free to cross our borders without restraint and without regard to any of the documentary requirements of the Immigration Act of 1924. . . .
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> * * *
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> "The theory of the Service . . . can be supported only through the use of the doctrine of relation back, a legal fiction at best. We do not think this legal fiction must be universally applied in every situation regardless of the particular circumstances involved. For example, we hardly think that a man in respondent's position who exercised his rights of citizenship prior to the cancellation of his certificate of naturalization could be punished for so acting even though, through the operation of the doctrine of relation back, he was an alien at the time he exercised those rights and even

> though his acts might be said to have been illegal. To us it seems unfair to seize upon a fiction to require respondent to have done that which was impossible of performance, namely, to present an immigration document at the time of his 1931 entry. 'Respect for law does not thrive on captious interpretations.' *Delgadillo* v. *Carmichael,* 92 L. Ed. Adv. Op. 69, 71 [332 U.S. 338 (1947)]. To construe the 1924 Act to require the impossible strikes us as a captious interpretation, an interpretation that we do not think Congress could have intended.'"*

So long as the Board was dealing with statutes framed in the past tense, the invocation of the relation-back doctrine was of relatively little materiality, for the statutes themselves were held to apply to present aliens who had pre-alienage convictions, quite apart from any relation-back doctrine. See *United States ex rel Eichenlaub* v. *Shaughnessy,* 338 U.S. 521; *Resurreccion-Talavera* v. *Barber,* 231 F. 2d 524 (9th Cir. 1956).

In its argument that § 241(a)(4) applies to petitioner although he was not an alien at the time of the convictions, the government, taking a phrase out of context from the opinion in *Lehmann* v. *United States ex rel. Carson,* 353 U.S. 685, 689, suggests that this Court has construed § 241(a)(4) to apply to an alien who *has been* convicted of two crimes. Brief, p. 5. In *Carson* the alien sought to be deported had *at all*

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* Subsequently, the Board limited *Matter of C—* to deportation orders based on documentary charges, under the misapprehension that such a limitation was required by this Court in *Eichenlaub.* See *Matter of P—,* 4 I. & N. Dec at 375. But *Eichenlaub* compelled no such limitation, since it avoided any approval of the relation-back doctrine. See *United States ex rel Brancato* v. *Lehmann,* 239 F. 2d at 666.

*times* been an alien. There was no issue relating to concurrence *vel non* of alienage and convictions. The issue before the Court was whether a twice-convicted alien who was non-deportable under the provisions of the pre-1952 deportation statute became deportable when § 241(a)(4) was enacted in 1952. The Court held that the alien did become deportable in 1952. Nothing in the opinion suggested that he would be deportable if he had not been an alien at the time of his convictions. All that the Court said in the language relied on by the government is that one who, before 1952, has fulfilled the conditions of deportability prescribed by the 1952 Act, may be deported. Those conditions, we argue (and nothing in *Carson* is to the contrary), are the concurrence of alienage and convictions. In using the past tense form "has been convicted", the Court only meant, as is clear from the context, that the 1952 deportation provision could apply even though the conditions of deportability occurred before 1952.

It is submitted, in the light of the foregoing, (1) that § 241(a)(4) unambiguously excludes petitioner from the class of deportables, because he was not an alien when convicted of tax evasion; (2) that, even if there were ambiguity in subsection (a)(4) of § 241, subsection (b) of the same section and the principle of *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, would resolve the ambiguity against deportability; (3) that there is, therefore, no occasion to read into § 241(a)(4) the provisions of an entirely separate and unrelated statute governing denaturalization; and (4) that, even if the relation-back provision of the denaturalization statute were imported into § 241(a)(4), it could do no more than introduce an ambiguity which would, in any case,

have to be resolved against deportability under the principle of *Fong Haw Tan*.

Respectfully submitted,

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